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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 10/780,182 | 02/17/2004 | Mark Emmett Malone | F3330(C) | 9861 |

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UNILEVER
PATENT DEPARTMENT
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| EXAMINER | |
|---|---|
| DONOVAN, MAUREEN C | |
| **ART UNIT** | **PAPER NUMBER** |
| 1761 | |

DATE MAILED: 07/12/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

| Office Action Summary | Application No. | Applicant(s) | |
|---|---|---|---|
| | 10/780,182 | MALONE ET AL. | |
| | Examiner | Art Unit | |
| | Maureen C. Donovan | 1761 | |

*-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --*

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1)☐ Responsive to communication(s) filed on _____.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4)☒ Claim(s) 1-17 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) 1-17 is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

**Application Papers**

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date 2/16/05.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

## DETAILED ACTION

1. This action is in response to communications: Amendment filed 11 April 2005.
2. Claims 1-17 are pending.
3. The objection to claims 9,10,11 and 12 is withdrawn in view of the current claim amendments.
4. The rejection of claim 6 under 35 USC 112 second paragraph is withdrawn in view of the current claim amendments.

### *Claim Rejections - 35 USC § 102*

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

1. Claims 1,2,3,5,6,7,8 and 9-12 are rejected under 35 U.S.C. 102(b) as being anticipated by Cole, US patent number 4 452 824.

Cole discloses a frozen product comprising a cartridge (see Column 1, lines 52-55) containing a frozen aerated product having an overrun chosen from the range of 50-200%, which would include overruns of less than 100%, less than 70%, less than 60%, less than 50% and overruns more than 40% and more than 50%, if desired (see Column 4, lines 66-68 and Column 5, lines 1-10). Note that the reference discloses that the overrun is chosen based on the density of the resulting product desired (see Column 4, lines 66-68 and Column 5, lines 1-10). Cole discloses that the product includes less than 1.5% w/w glycerol (containing no glycerol) (see Columns 7 and 8, Table 2, Run # 89), freezing point depressants in an amount above 25 % w/w and below 37 % w/w (see Column 2, lines 6-8 and lines 14-17), less than 5 % w/w fructose (containing no fructose) (see Columns 7 and 8, Table 2, Run # 89), between 2% and 8% proteins (see Column 5, lines 65-66) and between 0 and 15% fat, which would include between 2% and 12% fat (see Column 5, lines 25-30).

Note that the office interprets that the reference teaches the fat concentrations as claimed since the reference teaches that the fat content is not critical and is variable around the range disclosed, which is 2-15% fat.

Regarding the number average molecular weight of the composition of Cole: although the reference does not directly disclose the number average molecular weight, as the referenced composition possesses the components and structural features as instantly claimed, and since the freezing point depressants used by the reference are from the group as disclosed by the applicant (see Cole, Columns 7 and 8, Tables 1 and 2, Run #s 89,90,93,and 85 and the Specification, pages 4-5) in the weight percents as instantly claimed, the number average molecular weights recited in claims 1 and 3 would be considered inherent to the composition, absent any clear and convincing evidence and/or arguments to the contrary. As the Patent Office does not possess the facilities to test the referenced composition and that of the claimed invention, the burden then shifts to applicant to demonstrate any patentable difference between the two.

***Response to Arguments***

Applicant's arguments filed 16 February 2005 have been fully considered but they are not persuasive. At page 2 of the response, applicant states that the reference teaches compositions having a number average molecular weight that is higher than what is instantly claimed. This is not deemed persuasive.

The applicant has submitted that Runs # 89,90,93 and 85 as shown in Table 2, Columns 7 and 8, have a number average molecular weight of 297,299,310 and 290 respectively. However, no information, evidence or explanation as to where these numbers were generated from has been presented. Therefore the arguments are not deemed persuasive. More convincing evidence is necessary to show what the number average molecular weights of these runs are. It is suggested that calculations or explanations be submitted. The examiner has attempted to calculate the number average molecular weight of each of the runs of Cole, based on known published molecular weights of each of the components and the equations presented by the applicant in the specification on page 4. However, the molecular weight of the higher saccharides is unkown, and therefore the calculations were not able to be completed. The examiner performed a back calculation for each run of Cole, using the number average molecular weight as recited by the applicant for each run in the arguments on page 5 and the known

weight and molecular weight of each of the components, in order to determine what the molecular weight of the higher saccharides is. In each back calculation for each run, a different molecular weight was determined for the higher saccharides. It is not appreciated why the molecular weight for the higher saccharides would change between runs. Therefore, the number average molecular weights as submitted by the applicant are not deemed persuasive, due to lack of evidence or explanation as to how the numbers were generated. Additionally, it is still deemed that the number average molecular weights of the runs as disclosed by Cole would be inherently within the ranges as instantly claimed, as explained in the above rejection.

### *Claim Rejections - 35 USC § 103*

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

2. Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Cole '824 as applied to claims 1,2,3,5,6,7,8, and 9-12 above and further in view of Cole, US patent number 4 374 154.

Cole '824 discloses all the features of the instantly claimed invention except for the freezing point depressants having being constituted at 98% of mono, di and oligosaccharides.

Cole '154 teaches a frozen aerated confection that has freezing point depressants that are constituted at a level of at least 98% of mono, di and oligosaccharides (see Columns 9 and 10, Table 5, Run#25).

Using the freezing point depressant constitution as taught by Cole '154 in the invention as disclosed by Cole '824 would have been obvious to one of ordinary skill in the art at the time of the invention since both are directed to low temperature soft serve frozen confections and since the constitution as taught by Cole would produce a product

that was sufficiently soft at low temperatures to be extrudable (see Column 1, lines 46-48).

3. Claims 13-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cole '824 as applied to claims 1,2,3,5,6,7,8, and 9-12 above and further in view of De Vries, US patent number 3 752 364.

Cole '824 discloses all the features of the instantly claimed invention except for the exact type of cartridge to be used for the frozen aerated product.

De Vries teaches a cartridge for a frozen aerated product such as ice cream (see Column 1, lines 17-20), wherein the cartridge comprises a hollow cylindrical body (see Column 1, lines 51-52 and Figure 1, Reference number 3) which is open at one end and closed by an end wall at the other end, a dispensing aperture in the end wall through which the frozen aerated product is dispensed (see Figure 1 and Column 1, lines 61-63 and Column 2, lines 1-8). Note that when the stopper is removed from the container as taught by De Vries, the container is open at one end. De Vries teaches that the container has a plunger which sealingly fits within the bore of the cylindrical body and which is movable within the bore of the cylindrical body towards the end wall so as to urge the frozen aerated product towards the dispensing aperture whereby it can be extruded through the dispensing aperture (see Figure 1 and Column 2, lines 7-8). Note that the word "aperture " for purposes of this examination was taken to mean "an opening or open space", as defined by Merriam Webster's Collegiate Dictionary, 10th Edition, lacking a more specific definition in the applicant's disclosure. De Vries teaches that the dispensing aperture is covered prior to use by a removable seal or a flexible membrane sealed to the body to enclose the frozen aerated confection prior to dispensing (see Column 2, lines 2-3, lines 5-6 and lines 24-26 and Figure 1, Reference number 14). Note that the office interprets the stopper as taught by De Vries to be "flexible" as it is made of plastic, a flexible material (definition of the word "flexible" by Merriam Webster's Collegiate Dictionary, 10th Edition is "pliant" and definition of the word "plastic" by the same is "pliable" therefore a plastic material is flexible). De Vries also teaches that the end wall is in the shape of a truncated cone (see Figure 1, Reference 5) with the larger

circular base of the cone being directly attached to the end of the cylindrical wall of the cartridge (see Figure 1, Reference number 5 and 18) and the dispensing aperture being located in the smaller circular surface of the truncated cone (see Figure 1, Reference number 13) and a cylindrical wall of the cartridge that extends outwardly beyond the end wall (see Figure 1, Reference number 18).

Using the cartridge structure as taught by De Vries for the generic cartridge as disclosed by Cole '824 would have been obvious to one of ordinary skill in the art at the time of the invention since both are directed to ways of dispensing frozen aerated products and since the cartridge as taught by De Vries would be convenient for both the transport and dispensing of the frozen product (see De Vries, Column 1, lines 49-51).

### *Response to Arguments*

The arguments presented in the response filed 16 February 2005 with regard to claims 4 and 13-17 reflect the arguments made against claims 1,2,3,5,6,7,8 and 9-12. As the rejection was maintained above regarding claims 1,2,3,5,6,7,8 and 9-12, so is the rejections regarding claims 4 and 13-17.

### *Double Patenting*

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 1-17 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-9 of copending Application No. 10/323303 in view of Cole, US patent number 4 452 824 and De Vries, US patent number 3 752 364. The reference and rejection are incorporated as cited against claims 1-17 in the previous Office action mailed 13 August 2004.

## *Conclusion*

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Morley, US patent number 4346120.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Maureen C. Donovan whose telephone number is (571) 272-2739. The examiner can normally be reached on 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status

information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

MCD

KEITH HENDRICKS
PRIMARY EXAMINER